

1 THE HONORABLE BENJAMIN H. SETTLE  
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8 UNITED STATES DISTRICT COURT  
9 WESTERN DISTRICT OF WASHINGTON  
10 AT TACOMA  
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13 DAVID T. GILCHRIST, et. al.,  
14 v.  
15

Plaintiffs,

16 BAYVIEW LOAN SERVICING, LLC, et. al.,  
17 Defendants.

No.: 3:16-cv-05788

REPLY IN SUPPORT OF SUMMARY  
JUDGMENT BY DEFENDANT QUALITY  
LOAN SERVICE CORP. OF WASHINGTON

**NOTE ON MOTION CALENDAR:  
OCTOBER 21, 2016**

18 COMES NOW defendant Quality Loan Service Corp. of Washington (“Quality”) and  
19 submits this reply in support of summary judgment.

20  
21 **I. REPLY**

22 **A. The Gilchrist’s Response Is Untimely and Not Supported By Declaration.**

23 Under LCR 7(d)(3), a response to a motion for summary judgment is due filed and served  
24 the Monday before the noting date. Quality’s motion for summary judgment was noted for  
25 October 21, 2016. The Gilchrists’ response was filed and served October 24, 2016. The  
26 Gilchrists’ response is untimely and should not be considered.

27 Additionally, FRCP 56(c)(4) requires that responsive facts be set forth by “affidavit made  
28 on personal knowledge, set out facts that would be admissible in evidence, and show that the  
affiant or declarant is competent to testify on the matters stated.” The Gilchrists have failed to  
file complying affidavits in response to summary judgment. To the extent they ask the court to  
consider facts and documents in response to summary judgment, they have failed to follow the  
proper procedures, and the court should decline to do so.

1       **B. Quality Complied With State Law In Advancing Foreclosure.**

2           According to Quality's records, which were received in the ordinary course from the loan  
 3 servicer, the loan in question is owned by Freddie Mac. This was verified through Quality's  
 4 declaration submitted in support of summary judgment. The Gilchrists have not timely submitted  
 5 evidence in response creating a genuine issue of material fact as to Freddie Mac's ownership of  
 6 the loan.

7           The Gilchrists need look no farther than *Brown v. Dep't of Commerce*, 184 Wn.2d 509,  
 8 533 (Wash. 2015) to understand how Freddie Mac mortgage loans work and how they are  
 9 enforced under Washington law. Freddie Mac purchases loans from originating lenders and  
 10 utilizes a loan servicer to perform daily activities associated with the loan, such as invoicing  
 11 borrowers, collecting mortgage payments, and generally interfacing with borrowers. *Id.* at 521-  
 12 22. Under the servicing agreement, the loan servicer holds the promissory note, endorsed in  
 13 blank, and enforces a default. *Id.* at 522-23. Because the loan servicer holds and enforces the  
 14 promissory note, the loan servicer is the beneficiary of the deed of trust under Washington law.  
 15 *Id.* at 540; RCW 61.24.005(2) (beneficiary is the holder of the note).

16           As explained in Quality's motion for summary judgment, this foreclosure was advanced  
 17 by Quality pursuant to the law in all respects. Bayview, the current loan servicer for Freddie  
 18 Mac<sup>1</sup>, is the beneficiary of the deed of trust because Bayview holds the note. Bayview, as  
 19 beneficiary, had the ability to appoint Quality as successor trustee to advance the foreclosure.  
 20 Furthermore, the foreclosure notices issued by Quality identified the correct statutory information.  
 21 The Notice of Default correctly identified Bayview as the loan servicer and Freddie Mac as the  
 22 owner. The Notice of Sale correctly identified the most current assignment of the deed of trust to  
 23 Bayview. These foreclosure forms come directly from the statute; they are not Quality's  
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28           <sup>1</sup> Bank of America was the prior servicer of the loan.

1 creation. Quality's duty as trustee is to input the correct information into the statutory form,  
 2 which it did.

3 **C. Quality Is Not A “Debt Collector” under the FDCPA.**

4 Notwithstanding that Quality advanced the foreclosure pursuant to the law in all respects,  
 5 it could still not be held liable for unlawful debt collection under the FDCPA because nonjudicial  
 6 foreclosures are not “debt collection”. This has been recognized by state and federal courts  
 7 within the 9<sup>th</sup> circuit for many years<sup>2</sup>, and was recently affirmed by the 9<sup>th</sup> Circuit Court of  
 8 Appeals itself in *Vien-Phuong Thi Ho v. Recontrust Co., NA*, 2016 U.S. App. LEXIS 18836 (9th  
 9 Cir. Cal. Oct. 19, 2016). The *Vien-Phuong* case involved California’s non-judicial foreclosure  
 10 statute, which Washington’s was modeled-after. Both state statutes require a Notice of Default  
 11 followed by a Notice of Sale. *Id.*; RCW 61.24.030(8); RCW 61.24.040(1). The notices set forth  
 12 the loan arrears and the payment required to cure and discontinue the sale. *Id.*; RCW  
 13 61.24.030(8)(d-g); RCW 61.24.040(1)(f)(III-IV). Additionally, trustee’s sales under both state  
 14 statutes extinguish the debt for residential loans and no deficiency can be collected. *Id.*; RCW  
 15 61.24.100. Given the similarity of the statutes, the analysis from *Vien-Phuong* is equally  
 16 applicable to Washington trustees. Because in this case Quality was advancing a nonjudicial  
 17 foreclosure of the property pursuant to the statute, and nothing more, it was not engaged in debt  
 18 collection and is not a “debt collector” under the FDCPA.  
 19

20 **D. Quality Did Not Violate 15 USC 1692(f)(6).**

21 15 USC 1692(f)(6), which is broader in scope and applies to the enforcement of a security  
 22 interest, provides that it is a violation of the FDCPA to do the following:  
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24 (6) Taking or threatening to take any nonjudicial action to effect dispossession or  
 25 disablement of property if--

26 (A) there is no present right to possession of the property claimed as collateral  
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28 <sup>2</sup> *Hulse v. Ocwen Fed. Bank, FSB*, 195 F. Supp. 2d 1188, 1204 (D. Or. 2002); *Walker v. Quality Loan Serv. Corp. of Wash.*, 176 Wn. App. 294, 316 (Wash. Ct. App. 2013).

1 through an enforceable security interest;  
2 (B) there is no present intention to take possession of the property; or  
3 (C) the property is exempt by law from such dispossess or disablement.

4 The Gilchrists' have failed to produce evidence in opposition to summary judgment  
5 creating a genuine issue of material facts as to a violation by Quality of 1692(f)(6). The  
6 Gilchrists do not challenge the deed of trust as a valid encumbrance against their property,  
7 securing an obligation in default. And as already discussed, Quality was properly appointed  
8 beneficiary of the deed of trust by the holder of the promissory note. There has been no violation  
9 of 1692(f)(6) by Quality.

10                   **II.                  CONCLUSION**

11                 There is no genuine issue of material fact and dismissal of Quality is appropriate as a  
12 matter of law and leave to amend should be denied as futile.

13                 Dated: October 25, 2016

14                 MCCARTHY & HOLTHUS, LLP

15                 /s/ Joseph Ward McIntosh  
16                 Joseph Ward McIntosh, WSBA #39470  
17                 Attorney for Quality Loan Service Corp. of Washington